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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. 434

UNIVERSAL TRADES, INC.,

Appellant,

v.

COMMONWEALTH OF PENNSYLVANIA,

Appellee.

Appeal from the Supreme Court of Pennsylvania.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

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COMMONWEALTH OF PENNSYLVANIA,
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APPEAL FROM THE SUPREME COURT OF PENNSYLVANIA.

APPELLANT'S BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM.

Appellee in its Motion to Dismiss or Affirm has misconstrued the decisions of this Court and has made misleading and inaccurate statements. The purposes of this Brief are to make corrections and to prove summarily, in answer to appellee's contentions to the contrary, (1) that appellant has established a commercial domicile for itself and its intangible assets have acquired a business situs, in Florida, so as to support valid property taxation of appellant's intangible assets by that state, and (2) that this Court has not definitely and specifically decided the issue whether

Pennsylvania, the domiciliary state, may levy a property tax, eo nomine, on the same incidents of the same intangible assets which have been subjected to valid property taxation by Florida, the state of commercial domicile and business situs.

(1) Appellant has established a commercial domicile for itself and its intangible assets have acquired a business situs, in Florida, so as to support valid property taxation of its intangible assets by that state.

The legal effects of commercial domicile and business situs for property tax purposes are different. Under the decisions of this Court,[1] the state of commercial domicile has power to levy a property tax on *all* intangible assets, including those arising elsewhere in the absence of proof of "localization" of any intangible assets elsewhere, whereas the business situs state has power to levy a property tax only on such intangibles as have been proven to have acquired a business situs in the taxing state[2] because in the latter situation, the commercial domicile may continue to be in the domiciliary state or may be in some other state.

In the instant case, appellant has contended throughout the proceedings that Florida is the state of commercial domicile and business situs. Appellee, in its Motion to Dismiss or Affirm, fails completely to deal with the broader legal principles applicable to, and greater taxing power of, the state of commercial domicile, and limits its discussion to business situs only. The failure makes appellee's Motion fatally defective.

The facts of Record, as found by the lower state court,[3] and the discussion in the Jurisdictional Statement at pages 15-18, support beyond any doubt appellant's contention that

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[1] See cases cited in Note 20, p. 17, Jur. St.

[2] See cases cited in Note 18, p. 16, Jur. St.

[3] R. 24a-28a.

it has established both a commercial domicile and business situs in Florida.

Appellee's contention [4] that appellant's intangible assets have not acquired a business situs in Florida is based upon the inaccurate statement that appellant has never negotiated a contract in Florida; upon the theory that appellant's intangibles follow the location of its tangible property in Puerto Rico and the British West Indies which produced the intangibles; and upon the conclusion of four of the Justices of this Court in *Newark Fire Insurance Co. v. State Board*, 307 U. S. 313, 322, that the intangibles there involved had not acquired a business situs in New York.

The bases of appellee's contentions are without foundation:

a. The lower state court found as a fact that all construction contracts relating to work done on ships of the United States Government were entered into at appellant's Florida office (R. 24a).

b. In *Wheeling Steel Corp. v. Fox*, 298 U. S. 193, this Court rejected the contention that the power of West Virginia, the state of commercial domicile, to tax intangibles should be limited only to those intangibles produced by tangible property of plants located within the state. It pointed out that this contention confused two distinct subjects of *ad valorem* property taxation, the accounts receivable which arose from sales and manufacturing plants, and it said at page 213:

> "The accounts are not necessarily localized in whole or in part where the goods are made but are attributable as choses in action to the place where they arise in the course of the business of making contracts of sale."

So, also, in the instant case, the intangibles are attributable to Florida where the contracts were made and where appellant's entire business was managed, controlled and

[4] Motion to Dismiss or Affirm, pp. 16, 17, 18.

supervised and they, therefore, have a tax situs in Florida either on the commercial domicile or business situs theory.

c. The definite evidence of business situs, lacking in the *Newark* case, is present in the instant case—all contracts were made, all business was controlled, and all business emanated, in the alleged business situs state (Florida).

Appellee further contends[5] that its argument as to non-existance of business situs in Florida is supported by failure of appellant to allege that it had registered and qualified to do business in Florida and by lack of evidence to show that appellant obtained a permit to do business and paid a permit fee; and, also, that the Florida tax on appellant is not valid because appellant paid a franchise tax of $100 on intangibles of $100,000 for which it was not liable in view of the credit provisions of Section 199.07 of the Florida statute.

These further contentions must be rejected. They are likewise without foundation or constitute unsupported additions to the Record or a negligent interpretation of the Florida Statute:

a. The tax imposed under the Pennsylvania tax statute on *all* of appellant's intangible assets in the amount of $271,052.92[6] is a property tax, eo nomine.[7] Tax was imposed and paid by appellant under the Florida statute on the same intangible assets (R. 26a, 27a). Accordingly, the Record does not support appellee's statement that the Florida tax was paid upon only $100,000 of intangibles.

b. The Florida Statute[8] defines "intangible personal property" and levies an annual tax thereon. The statute has been construed as imposing a property tax on all in-

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[5] Motion to Dismiss or Affirm, pp. 17, 18.

[6] R. 26a, R. 27a.

[7] See Jur. St., p. 5 and Note 2.

[8] Florida Statutes Annotated, Vol. 10, Title XIII, Taxation and Finance, Secs. 199.01-02-07-11.

tangible assets having a taxing or business situs in the state.[9] Reference by appellee to the Florida tax as a franchise tax is inaccurate and without substance. Furthermore, Section 199.07 of that statute requires the filing of a return of taxable intangible property on or before April 1st of each year and it then provides:

> " * * * every person who becomes a legal resident of this state subsequent to January 1st and prior to the following April 1st of any year shall be subject to taxation on the date upon which such person becomes a legal resident of this state and such person shall file a return and be liable for intangible personal property taxes for said year; * * * and provided, further, that a credit shall be allowed against such taxes for any amount of intangible or income taxes such taxpayer is required to pay to another state for all or any part of said year on said intangible personal property or the income therefrom."

These credit provisions clearly apply *only* to a person becoming a *legal* resident between January 1 and April 1 in any year. They do not apply to appellant for the year involved (6-30-53) since it had established a commercial domicile and its intangible assets had acquired a business situs in Florida continually since September 27, 1951. Appellant, unequivocally and without any option given to it, is liable for the Florida tax for 1953 without any credit. Therefore, the statement[10] of appellee that appellant "saw fit to pay a tax for which it was not liable" is an inaccurate and misleading construction of the Florida Statute.

c. The Florida intangible tax on appellant is valid since its intangibles had a commercial domicile and business situs in that state.[11] Even if appellant had failed to

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[9] *Gay v. Bessemer Properties, Inc.*, 159 Fla. 729, 32 So. 2d 587 (1947).

[10] Motion to Dismiss or Affirm, p. 18.

[11] Jur. St., pp. 15, 16 and Note 18 (p. 16).

register and obtain a permit to do business in Florida, the validity of the Florida tax would not be affected.

Under the facts of Record in the instant case and the decisions of this Court, there can be no doubt that appellant established a commercial domicile and its intangible assets acquired a business situs, in Florida, and that the Florida tax on appellant's intangibles is valid.

(2) This Court has not definitely and specifically decided the issue whether Pennsylvania, the domiciliary state, may levy a property tax, eo nomine, on the same incidents of the same intangible assets of appellant which have been subjected to a valid property tax by Florida, the state of commercial domicile and business situs.

It must be kept in mind that the instant case involves a direct property tax on the same intangible assets by two states, and not multiple state taxes upon different or separate interests or attributes in the several taxing states in the bundle of rights comprising the intangible property, such as a transfer inheritance tax (not a tax on property eo nomine but upon a right or privilege of succession) on reservation of power to revoke trust and dispose of property,[12] relinquishment of power of revocation,[13] exercise by donee of power of appointment,[14] power over transfer by a corporation of its shares;[15] a tax on an equitable interest;[16] a tax on the person measured by his wealth;[17] a

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[12] *Curry v. McCanless*, 307 U. S. 357, 59 S. Ct. 900 (1939).

[13] *Graves v. Elliott*, 307 U. S. 385, 59 S. Ct. 913 (1939).

[14] *Graves v. Schmidlapp*, 315 U. S. 657, 62 S. Ct. 870 (1942).

[15] *State Tax Commission of Utah v. Aldrich*, 316 U. S. 174, 62 S. Ct. 1008 (1942).

[16] *Com. v. Stewart*, 338 Pa. 9, 12 A.2d 444 (1940); affirmed 312 U. S. 649, 61 S. Ct. 445.

[17] *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54, 38 S. Ct. 40 (1917).

tax upon property based on physical presence and protection afforded;[18] or a tax on the privilege "to be."[19]

In the multiple state taxes approved by this Court, the taxing state was held to have jurisdiction of the separate interest or attribute in the intangible property that was taxed; but this Court has reserved, and has not specifically and definitely decided, the issue involved in the instant case whether two states have power and jurisdiction to impose a direct property tax on the same incidents of the same intangible property, or stated another way, whether the domiciliary state, on the basis of the rule of mobilia sequuntur personam, may levy a direct property tax on the same intangible assets which have been subjected to valid property taxation by the state of commercial domicile and business situs.

In an opinion of four Justices of this Court in the *Newark Fire Insurance Co.* case,[20] it is stated at p. 319:

> "* * * We are asked to decide that both states have not the power to tax the same property for the same incidents. This question has been heretofore reserved. We do not find it necessary to answer it in this case."

A fifth Justice dissented from the judgment of the State court upholding the New Jersey domiciliary tax even though the intangible property had acquired a business situs in New York. Clearly the citing of this case by the appellee[21] as having decided the issue in the instant case so as to uphold the Pennsylvania tax is a misleading construction of that case.

In *Curry v. McCanless*,[22] in which this Court by a five to four division, upheld a Tennessee transfer inheritance

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[18] *Greenough v. Tax Assessors of Newport*, 331 U. S. 486, 67 S. Ct. 1400 (1947).

[19] *Kansas City, Memphis & Birmingham R. R. Co. v. Stiles*, 242 U. S. 111, 37 S. Ct. 58 (1916).

[20] 307 U. S. 313, 59 S. Ct. 918 (1939).

[21] Motion to Dismiss or Affirm, pp. 9 and 10.

[22] 307 U. S. 357, 59 S. Ct. 900 (1939).

tax upon the reservation by a Tennessee resident of the power to revoke a trust and dispose of property, Mr. Justice Stone in writing the majority opinion, said at p. 368:

> "• • • But taxation of a corporation by a state where it does business, measured by the value of the intangibles used in its business there, does not preclude the state of incorporation from imposing a tax measured by all its intangibles. *Cream of Wheat Co. v. Grant Forks*, supra, 329; see *Fidelity & Columbia Trust Co. v. Louisville*, 245 U. S. 54."

But Mr. Justice Reed, one of the majority, filed a statement concurring in the opinion except as to the statement quoted above and as to it he said at page 374:

> "• • • Upon this point he reserved his conclusion."

It is evident from Mr. Justice Reed's statement that the *Curry* case has not decided the issue in the instant case and that reliance by appellee[23] upon the quoted excerpt as having done so constitutes a misleading construction of the decision in the *Curry* case. It is evident, also, that in the current trend of this Court's decisions, the *Cream of Wheat* case, relied upon by appellee[24] and by the State Court[25] as upholding the Pennsylvania domiciliary tax in the instant case, is *not* considered as having specifically and definitely decided the issue. Furthermore, it is not clear whether a franchise tax or a property tax was involved in the *Cream of Wheat* case—it being construed in a recent state court as involving a franchise tax.[26]

Constitutional scholars do not consider the issue to be settled. In "The Constitution of the United States of America" (1953), prepared by the Legislative Reference Service of the Library of Congress and containing an-

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[23] Motion to Dismiss or Affirm, p. 13.

[24] Motion to Dismiss or Affirm, pp. 7, 10, 13.

[25] Jur. St., Appendix B., pp. 29, 30.

[26] *Standard Oil Co. v. Com. of Kentucky*, (Ky) 311 S.W.2d 372 (1958).

notations of cases decided by the Supreme Court of the United States to June 30, 1952, it is stated, concerning jurisdiction of the states to tax under the Fourteenth Amendment, at page 1042:

> "To determine whether a state or states may tax intangible personal property, the Court has applied the fiction mobilia sequuntur personam and has also recognized that such property may acquire for tax purposes, a business or commercial situs where permanently located; but it has never clearly disposed of the issue as to whether multiple *personal property taxation* of intangibles is consistent with due process."

In *Southern Pacific Co. v. McColgan*,[27] the court, concerning property taxation by the state of business situs and by the state of *mere* paper domicile, said at page 94:

> "It was held that the maxim of mobilia sequuntur personam did not preclude the imposition of a tax by the state of business situs imposed for the advantages enjoyed by the owner in that state, * * * As to whether the state of legal domicile might also tax such intangibles where it is a mere paper domicile, the cases are not clear."

and concerning property taxation by the state of commercial domicile and by the state of mere paper domicile, the court in the same case said at page 100:

> "Whether the commercial domicile is on a par ity with the legal domicile or whether it becomes a complete substitute for the technical domicile for tax purposes are questions not yet decided by the United States Supreme Court * * *."

The decisions and authority cited and discussed above by appellant establish clearly that the issues involved in the instant case as to direct ad valorem property taxation of the same intangible assets by two states has not been definitely and specifically decided by this Court. The cases

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[27] 68 Cal. App. 2d 48, 156 p. 2d 81 (1945).

cited by appellee [28] do not prove otherwise. We have shown that the *Newark Fire Insurance Co.* case [29], the only direct ad valorem intangible property tax case cited by appellee, did not decide the issue and that the *Cream of Wheat Co.* case [30] is not considered under the recent trend of decisions of this Court as deciding the issue. The other cases cited by appellee, dealing with State succession or inheritance taxes or a state tax by the domiciliary state on the transfer of corporate stock, where multiple state taxation of intangible personal property is supported by separate interests in or attributes of intangible property in each taxing state, are not controlling of the issue in the instant case as to direct ad valorem property taxation by two states of the *same* incidents of the *same* intangible assets. Furthermore, appellee cites decisions without regard to change in thinking by this court and is guilty of inaccuracies and misleading statement or construction of decisions in picking and choosing excerpts from decisions at random. An illustration of the latter is appellee's reference [31] to Mr. Justice Stone's alleged conclusion at page 237 in *First Bank Stock Corp. v. Minnesota.*[32] Having held that the property tax imposed by the business situs state was valid, appellee's reference to page 237 would make it appear that Mr. Justice Stone had ruled also that the domiciliary state could also tax all the intangibles on the basis of the mobilia rule but he did not do so as shown by the clause immediately following which was omitted by appellee:

> " * * * at least in the absence of activities identifying them with some other place as their business situs".

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[28] Motion to Dismiss or Affirm, pp. 9-15.
[29] 309 U. S. 313, 59 S. Ct. 918 (1939).
[30] 253 U. S. 325, 40 S. Ct. 558 (1920).
[31] Motion to Dismiss or Affirm, p. 15.
[32] 301 U. S. 234, 57 S. Ct. 677 (1937).

Appellant's contention, very simply stated, is that for purposes of direct ad valorem taxation of the same incidents of the same intangible assets of appellant, the intangibles had only one tax situs, and they were subjected to valid property taxation there. They did not, also, follow the legal domicile of appellant and have another tax situs in Pennsylvania. Therefore, Pennsylvania does not have jurisdiction to levy another property tax thereon and its tax violates due process. And it was so held in a recent decision by the Court of Appeals of Kentucky.[33] That Court ruled also that the decisions of this Court did not support property taxation of intangibles by the domiciliary state where they were subjected to valid property taxation by the state of commercial domicile and business situs.

3. Conclusion.

Appellant has asserted a federal right under due process based upon its conclusions that it has established a commercial domicile for itself and its intangible assets have acquired a business situs, in Florida. This Court must determine for itself whether the facts of Record support these conclusions.

The federal right asserted by appellant is that its intangible assets do not have a tax situs in two states for purposes of ad valorem property taxation; and that property taxation by Pennsylvania, the domiciliary state, of the same incidents of the same intangible assets which have been subjected to valid property taxation by Florida, the state of commercial domicile and business situs, violates due process. This Court has not definitely and specifically divided this issue. If the right asserted should be denied, all existing constitutional tests of the jurisdiction of a domiciliary state to tax the tangible and intangible property of a corporation created by it would be removed.

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[33] *Standard Oil Co. v. Commonwealth of Kentucky* (Ky) 311 S.W.2d 372 (1958).

Appellant submits that these issues of commercial domicile, business situs and validity of property tax by the domiciliary state under the circumstances in the instant case present substantial federal questions; that this Court should note jurisdiction to allow plenary consideration, with briefs on the merits and oral argument; and that appellee's motion to Dismiss or Affirm should be denied.

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